UMBC

v.

PEKELILING TRIANGLE SDN. BHD.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NOS. 02-381-1990 & 02-343-1990]
7 JUNE 1991

REVENUE LAW: *Interest capitalised under charge document - Whether stamp duty chargeable on the original loan amount only - Whether any stamp duty chargeable - Intention of Legislature - Rule of construction of documents - Stamp Act 1949, ss. 14, 28.*

The appellants in these appeals, UMBC and OCBC, had lent, as chargees, RM8 million and RM150,000 respectively to both respondents, who had consequently defaulted in repayment of principal and interest. The appellants applied to the High Court for sale of certain lands by public auction. N.H. Chan J held that the proceedings should be stayed until the charges concerned were upstamped with *ad valorem* duty for interest capitalised. (see [1991] 2 CLJ (Rep) 375). The appellants appealed, arguing that N.H. Chan J had erred in his construction of the Stamp Act (the Act). The issues before the Court were:

(a) whether interest which is capitalised under a charge document still retains the character of interest so that stamp duty is chargeable on the original loan amount only under s. 28(1) of the Act and

(b) whether such capitalised interest is interest for the purpose of s. 14 of the Act so that no stamp duty is chargeable on it.

Held:

[1] Statutes which impose duties are to be construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature.

[2] Interest is interest, however the amount is computed or calculated; compound interest is just as much interest as simple interest and is just as much entitled to any benefit which s. 14 of the Act gives to the subject.

[3] Capitalised interest and compound interest mean the same thing and capitalised interest is in fact compound interest which has not been capitalised; although it has been provided in the instruments the subject of these appeals that interest is to be capitalised, yet as unpaid interest, capitalised interest is interest for the purposes of s. 14 of the Act and these instruments need not be separately and further stamped under s. 14 of the Act.

[4] Under s. 28(1) of the Act stamp duty is only payable on the principal sum secured at the time of taking the security. If it should be intended that stamp duties should be chargeable on instruments reserving interest, then there ought to be an amendment of the Act to make the intention of the Legislature manifestly clear and unambiguous.

[Appeal allowed; case remitted to High Court for continued hearing of originating summons.]

[**Bahasa Malaysia** translation of headnote]

UNDANG-UNDANG HASIL: *Faedah dibayar di bawah dokumen gadaian - Samaada duti setem patut dibayar atas pinjaman asal - Samaada apa-apa duti setem boleh dituntut - Tujuan Badan Perundangan - Prinsip Pentafsiran Dokumen.*

Perayu dalam kedua-dua kes ini telah memberi pinjaman berjumlah RM8 juta dan RM150,000 kepada kedua-dua responden yang telah gagal membayar balik wang pokok (principal sum) dan faedah pinjaman tersebut. Perayu telah membuat permohonan kepada Mahkamah Tinggi untuk melelong secara awam tanah yang dicagar itu. Y.A. N.H. Chan H telah menangguhkan prosiding tersebut sehingga dokumen cagaran dikenakan duti setem *ad valorem* untuk bayaran faedah diatas faedah (capitalised interest). (lihat [1991] 2 CLJ (Rep) 375). Pihak perayu telah membuat rayuan atas alasan bahawa Y.A. N.H. Chan H telah mentafsir dengan salahnya Akta Setem 1949 (Akta tersebut).

Isu untuk Mahkamah ialah:

(a) sama ada faedah diatas faedah yang dikenakan keatas dokumen cagaran masih dianggap sebagai faedah supaya setem duti hanya dikenakan keatas pinjaman asal dibawah s. 28(1) Akta tersebut dan

(b) sama ada faedah di atas faedah boleh dianggap sebagai faedah seperti yang dimaksudkan di bawah s. 14 Akta tersebut; jika begitu, duti setem tidak boleh dikenakan.

Diputuskan:

[1] Akta-akta yang mengenakan duti mesti dengan jelasnya mensyaratkan demikian. Sekiranya Akta-akta ini tidak berbuat demikian, duti tidak boleh dikenakan.

[2] Faedah itu tidak berubah maknanya walau bagaimanapun ia dikira; faedah kompoun adalah faedah juga dan berhak menerima manfaat yang diperuntukkan di bawah s. 14 Akta tersebut.

[3] Faedah diatas faedah dan faedah kompoun mempunyai makna yang sama - faedah di atas faedah adalah faedah kompoun yang tidak di (capitalised); walaupun telah disyaratkan di dalam dokumen di dalam rayuan ini bahawa faedah mesti di (capitalised), faedah di atas faedah, sebagai faedah yang belum dibayar, adalah faedah bagi maksud s. 14 Akta tersebut dan dokumen-dokumen cagaran ini tidak perlu dikenakan duti setem.

[4] Di bawah s. 28(1) Akta tersebut, duti setem hanya perlu dibayar keatas pinjaman asal apabila cagaran diterima. Jika faedah juga patut dikira apabila duti setem patut dikenakan keatas faedah, pindaan kepada Akta patut dibuat untuk menggambarkan dengan jelas niat Parlimen.

[Rayuan diluluskan; kes dirujuk kepada Mahkamah Tinggi untuk pendengaran saman pemula,]

Cases referred to:

Bank of New South Wales v. Brown [1982-1983] 151 CLR 514
Barisal Rindan Samiti v. Sital Chandra Mukhopadhya 129 IC 407; AIR Cal 630, (FB)
Clifford v. IRC [1896] 2 QB 187
Commrs. v. Angus & Co. Ltd. [1889] 23 QBD 579
Commercial Banking Co. of Sydney Ltd. v. Love & Anor. [1975] 7 ALR 535
Daines v. Heath [1847] 3 CB 938
Denn & Manifold v. Diamond [1825] 4 B, C 243
Hennell v. IRC [1933] 1 KB 415
In re Jauncey [1926] Ch 471

In re Morris, Mayhew v. Halton [1922] 1 Ch 126
Inland Revenue Commissioners v. Oswald [1945] AC 360
Paton v. Inland Revenue Commissioners [1938] AC 341
Phillips v. Morrison [1844] 13 LJ Ex 212
Pruessing v. Ing. 106 ER 912
R v. Winstanley [1831] 1 Cr & J 434
Re Waterhouse's Policy [1937] Ch 415; [1937] 2 All ER 91
Tomkins v. Ashby [1827] 6 B & C 541
Westpac Banking Corp. v. Mousellis [1985] 37 NTR 1

Legislation referred to:
Bankruptcy Act 1966 [Aust], s. 112
National Land Code 1965, ss. 255, 256
Stamp Act 1891 [UK], s. 88(2)
Stamp Act 1899 [Ind], s. 23
Stamp Act 1949, ss. 2, 4, 5, 14, 28(1), 39
Stamp Act 1921-1967 (Western Australia) [Aust], s. 83(2)
Taxation (Administration) Act 1978 [Aust], ss. 4(3), 69(B)(3), 121

Other sources referred to:
Encyclopedia of Forms and Precedent, 4th Edn., Vol. 14
S. Row's Indian Stamp Act, 3rd Edn., p. 162
Sergeant and Sims on Stamps Duties, 9th Edn., p. 18

For the appellant (C.A. No. 02-381-90) - Wong Chong Wah (Shamsul Bahrain bin Ibrahim with him); M/s. Skrine & Co.
For the respondent (C.A. No. 02-381-90) - Chew Kim Poh; M/s. Yusof Abdullah & Partners
For the appellant (C.A. No. 02-343-90) - Porres Royan (Mary Nitchingham with him); M/s. Shook Lin & Bok
For the respondent (C.A. No. 02-343-90) - M.A. Vadiveloo; M/s. Veloo & Co.
Amicus Curiae - M.S. Murthi; M/s. M.S. Murthi & Partners

[**Editor's Notes:** The following appeal was heard together at this Supreme Court sitting: *Oversea-Chinese Banking Corp. Ltd. v. Idris bin Mohamed* (Sup. Crt. Civil Appeal No. 02-343-1990).]

JUDGMENT

Gunn Chit Tuan SCJ:

The issues raised in these two appeals, which were heard together, involve the Court's interpretation of ss. 14 and 28 of the Stamp Act 1949 (Consolidated and Revised - 1989) (hereinafter referred to as "the Act"). The principal issue in these cases was concerned with the construction of s. 28 of the Act, that is,whether interest which is capitalised under a charge document still retains the character of interest so that stamp duty is chargeable on the original loan amount only under s. 28(1) of the Act. The other issue is connected with the principal issue and raises the question whether such capitalised interest is interest for the purpose of s. 14 of the Act so that no stamp duty is chargeable on it.

The background facts of these cases are simple. Two banks, namely the United Malayan Banking Corporation Berhad (hereinafter referred to as "UMBC") and the Oversea-Chinese Banking Corporation Limited (hereinafter referred to as "OCBC") as chargees had lent RM8,000,000 and RM150,000 respectively to the abovementioned respondents, both of whom had defaulted in repayment of principal and interest after service of notices in Form 16E under s. 255 of the National Land Code 1965. In the UMBC case, the loan agreement contained the following clause relating to interest:

> 8.4 Subject to the provisions of clause 8.5 hereof the interest on any principal money for the time being owing including capitalised interest shall at the end of each calendar month be capitalised and be added for all purposes to the principal sum then owing and shall thenceforth bear interest at the prescribed rate and be secured and payable accordingly and all the covenants and conditions contained or implied by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalised arrears of interest and to interest on such arrears.

And in the OCBC case, the annexure to the charge contained the following clause:

> 17. The interest on any principal moneys for the time being hereby secured including capitalised interest shall at the end of each calendar month be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the rate aforesaid and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalised arrears of interest and to interest on such arrears.

Both banks subsequently applied by originating summons to the High Court at Kuala Lumpur under s. 256 of the National Land Code 1965, for orders that certain pieces of land charged to them in Kuala Lumpur be sold by public auction. In the course of hearing those applications, N.H. Chan J stated that there was a stamp duty question and after hearing submissions of Counsel for the parties concerned as well as Mr. M.S. Murthi, who was invited by the learned Judge to be *amicus curiae*, made an order in each case that proceedings be stayed pending the payment of stamp duties on the "interest capitalised" under the charges concerned.

UMBC and OCBC each filed a notice of appeal to this Court against the learned Judge's refusal to make an order for sale by way of public auction in respect of the lands in question. The memoranda of appeal of both the appellants raised several grounds of appeal which in effect amounted to a contention that the learned Judge had erred in his construction of the Act, particularly of s. 28 thereof, as requiring the charges concerned to be upstamped with *ad valorem* duty for "interest capitalised".

The Stamp Act 1949, is an Act relating to stamp duties and, as Lord Tenterden has stated in *Tomkins v. Ashby* [1827] 6 B & C 541, 542:

> Statutes imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature.

The rules of construction of documents for stamp duty purposes and of stamp duty legislation are well summarised in the following passages from *Sergeant and Sims on Stamps Duties* (9th Edn.) at p. 18:

> **(a) General rule of construction of charge**
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> It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language, *Denn & Manifold v. Diamond* [1825] 4 B & C 243, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous, *Daines v. Heath* [1847] 3 CB 938. The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it, and no intendment can be made in favour of the liability, *Phillips v. Morrison* [1844] 13 LJ Ex 212, and see *R v. Winstanley* [1831] 1 Cr & J 434.

(b) Ambiguity

If the statute is so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, one more favourable to the Crown and the other to the subject, then the latter construction should be adopted, *Clifford v. IRC* [1896] 2 QB 187, approved and followed in *Hennell v. IRC* [1933] 1 KB 415 CA. In other words, the subject, and not the Crown, is entitled to the benefit of the doubt *R v. Winstanley, supra*.

We ought to bear in mind the above-quoted rules and that the object of the Act relating to stamp duties is to raise revenue by requiring documents of certain kind to be stamped. In other words, the Stamp Acts tax documents and not transactions (*Commrs v. Angus & Co. Ltd.* [1989] 23 QBD 579). Before we proceed to construe ss. 14 and 28 of the Act, we should also note the following relevant definitions in s. 2 of the Act:

2. **"charge"** means any instrument whereby, for the purpose of securing the payment of any definite and certain sum of money advanced or lent at the time or previously due or foreborne to be paid or for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon any account current, together with any sum already advanced or due, or without, as the case may be, or for the performance of any contract or engagement, one person creates a right over or charge upon any specified property; and includes any instrument which purports to create or in which any person agrees to create any such right or charge;

"mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due or foreborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be;

It is to be observed that the definition of a "charge" for the purposes of stamp duties under the Act is specific and means any instrument for securing the payment of a definite and certain sum of money advanced or lent at the time or previously due or foreborne to be paid. The expression "mortgage" for the purposes of the Act also means a security for a definite and certain sum of money advanced or meant to be paid. Both are chargeable with stamp duty under s. 4 of the Act, being instruments specified as item 27 in the First Schedule of the Act, and it is a general rule of stamp duty that the liability of an instrument to duty depends on the facts and circumstances existing at the date of its execution as provided for in s. 5 of the Act.

The section governing the stamping of instruments reserving interest is s. 14 of the Act which is as follows:

14. When interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable if no mention of interest had been made thereon.

We have not been referred to nor are we aware of any such provision in the corresponding legislation of other jurisdictions except s. 23 of the Indian Stamp Act 1899, which is as follows and is in *pari materia* with s. 14 of our Act:

23. Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein.

According to *its Indian Stamp Act* (3rd Edn.) at p. 162, the rule is that express mention of interest in an instrument does not affect the duty with which it is chargeable and that the said section conforms to the English law. It was decided by a Full Bench in Calcutta consisting of Rankin CJ and C.C. Ghose and Patterson JJ in *Barisal Rindan Samiti v. Sital Chandra*

Mukhopadhya 129 IC 407; AIR Cal 630, 631 (FB) through a judgment delivered by Rankin CJ that interest is interest, howsoever the amount is computed or calculated. Compound interest is just as much interest as simple interest and is just as much entitled to any benefit that s. 23 gives to the subject. Therefore a stipulation in an instrument to pay compound interest need not be separately stamped as a separate agreement. We are of the view that the same reasoning should apply to the construction of our s. 14 of the Act which, as pointed out above, is similar to s. 23 of the Indian Stamp Act 1899.

Our attention was also drawn to *In The Matter of the Stamp Ordinance 1881 and 1885 re S.R.M. Subramaniam Chitty's Mortgage* [1902, 1903] 7 SSLR 92, which involved a mortgage deed expressed to be made for securing payment of:

> the principal sum of RM12,000 (whereby RM7,500 is the amount advanced and RM4,500 is for interest thereon calculated for a period of 60 calendar months from the date hereof.)

Cox CJ of the former Supreme Court of the Straits Settlements held in 1902 that the mortgage deed was liable to *ad valorem* stamp duty upon RM7,500 only. We have read the Straits Settlements Stamp Ordinance 1881, and found the following section therein relating to instruments reserving interest:

> 22. Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein.

It will be observed that s. 14 of the Act is similar to the above-quoted section. The decision of the Straits Settlements Supreme Court in the *Subramaniam Chitty's Mortgage* (*supra*) case is supported by the Calcutta Full Bench's interpretation of s. 23 of the Indian Stamp Act 1899 in the year 1930. We would therefore similarly conclude in these cases that capitalised interest is interest for the purpose of s. 14 of the Act so that no further stamp duty is chargeable thereunder.

We now come to s. 28 of the Act, which is as follows:

> 28(1) A security for the payment or repayment of money to be lent, advanced or paid, or which may become due upon an account current, either with or without money previously due, shall be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.
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> (2) Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty stamped thereon extends to cover; but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument bearing date on the day on which the advance or loan is made.

Section 28 of the Act is in *pari materia* with s. 88 of the UK Stamp Act 1891, which we would not reproduce here as it was referred to in the judgment of Farwell J to which we would refer later on in this judgment.

Although s. 88 of the UK Stamp Act 1891, was in force until 1971 when it was repealed by the Finance Act 1971, which abolished stamp duty on bonds, mortgages, etc., in the United Kingdom, neither we nor Counsel have found a relevant decision of the English Courts under that section except *Re Waterhouse's Policy* [1937] Ch 415; [1937] 2 All ER 91, 96, in which Farwell J of the Chancery Division held that where a charge to secure a current account without a limit is stamped with a stamp sufficient to cover advances up to a certain sum and the current account subsequently exceeds that sum, the charge is valid security properly

stamped for that sum, but is unenforceable as to the remainder of the loan until properly stamped. As this is a relevant English decision under the repealed s. 88 of the UK Stamp Act 1891, it would be useful to refer to the following passages in the judgment of Farwell J in that case:

> The whole controversy in this matter depends upon two sections of the Stamp Act 1891. Section 88, subsection 1, provides:
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> > A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.
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> So far there would not appear to be any difficulty. Where the loan is for a definite fixed sum and security is given for that sum, a stamp duty is to be paid sufficient to cover the total amount which the lender is entitled to recover. It is quite plain that in order to make the security a security for the full amount agreed to be lent, the security must be stamped on the total of that sum.
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> Then subsection 2 provides:
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> > Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made.
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> In my judgment, that is not the true effect of subsection 2 of s. 88. The effect of that subsection is this. Where the total amount is unlimited, as for instance in this case where the bank permits one of its clients to overdraw his account and there is no fixed limit placed upon the amount allowed in overdraft, or where there is a security for a limited sum, and an overdraft is allowed beyond that limited sum, there is no necessity to stamp the security for any amount greater than the amount for which the bank rely upon it as a security for the loan. By that I mean that if a bank chooses to take security for an overdraft and stamps that security with a stamp which is only sufficient to cover a limited sum, then, as the result of subsection 2, the bank is precluded from claiming either in a Court of law or elsewhere that the security which it has is a security for any greater sum than that which the stamp on it covers.

It should, however, be pointed out that although *Re Waterhouse's Policy* (*supra*) was a decision under s. 88 of the UK Stamp Act 1891, it was a case involving an insurance policy assigned to a bank by way of mortgage to secure a current account without limit and the assured's loan from the bank was in excess of the amount for which the assignment was stamped.

We were, however, also referred to *Pruessing v. Ing* 106 ER 912, in which case Abbott CJ held in 1821 that a promissory note for the payment of £30 at 3 months after date, with interest from that date, requires a stamp applicable to a note not exceeding £30. His Lordship, after referring to the Stamp Act of that period, said as follows:

> The object of the Legislature was to impose a *prorata* stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. The question, therefore, in this case is, what was the sum due at the time when the note was taken? For that is the sum secured. I am quite satisfied that the words 'sum of money' in the Act, mean the principal sum mentioned in the note, and not a sum compounded of principal and interest. A contrary decision would be most mischievous, and

> have the effect of avoiding many securities; for it has been the constant practice, under similar provisions applicable to bonds in this and former Stamp Acts, to measure the stamp duty by the principal sum secured, although interest is always made payable for the date of the bond.

The above is therefore another case which confirms that stamp duty is only payable on the principal sum secured at the time of taking the security.

Reference was also made to Vol. 14 of the *Encyclopedia of Forms and Precedents* (4th Edn.) in which the learned authors, in a footnote at p. 84 has stated that "amount secured" means principal money secured and does not include interest (even when in arrears) costs and commission. A provision in a mortgage for unpaid interest to be added to the principal sum secured does not render the mortgage liable to further stamp duty when the capitalisation takes place.

We now turn to a few revenue cases in which it was decided in relation to income tax legislations that capitalised interest and compound interest mean the same thing. It was also decided that the word "paid" means actual payment and not notional payment. The first case is *In re Morris, Mayhew v. Halton* [1922] 1 Ch 126, 132, 133, in which case Lord Sterndale in relation to compound interest with annual rests said as follows:

> The process would be more complicated but would, as it seems to me, effect the same result, if the interest were not added to the capital, but two accounts were kept, one charging interest upon capital year by year, and the other charging interest upon the sums of overdue interest which are not paid from year to year. That however is not the way in which it is done in practice. It would be a cumbrous and unbusiness like way of doing it. The way in which it is done as a matter of business is by adding the interest year by year - namely, the interest for the first year to the capital sum, the interest for the second year to the capital sum, plus the first year's interest. This is commonly and conveniently spoken of as capitalising the interest. It is capitalising the interest in a sense, and in the sense in which Mr. Beaumont put the matter to us. He said that the interest should be treated as capital for the purpose of bearing interest; and in the sense that it becomes a thing which bears interest itself, which interest, as a rule, does not, it may be said to be capitalised - that is to say, it may be said to be put in the same position as capital in the sense that it is regarded as a thing which bears interest. But it seems to me that it is going a very long way beyond that to say that it is made capital for all purposes, and that when it is paid, at the expiration of three, four, five or ten years, it is all paid, with the exception of the last year, as capital. I do not think that the words "compound interest with yearly rests" at all necessarily show, or indeed do show, that the mortgagors intended that any unpaid interest should become capital for all purposes, the result no doubt, if it were so, being that they would pay more than they would if it were to be considered as interest, because if they had paid their interest at the end of the first year they would have paid less tax.

In that case, it was decided that compound interest had not been capitalised and was still "interest of money" within the meaning of the UK Income Tax Act 1918.

The next case is *Paton v. Inland Revenue Commissioners* [1938] AC 341, in which case the House of Lords held that the action of a bank in debiting the account of a customer with interest did not constitute as between it and the customer a payment of interest by the customer within the meaning of the Income Tax Act 1918. Lord Atkin, in relation to a provision in the deed concerned which enables interest to be capitalised said, quoting Lord Russell in *In re Jauncey* [1926] Ch 471:

> The interest is not capitalised because it is in fact paid, but because it has in fact not been paid.

Lord MacMillan also said as follows:

> My Lords, it is a condition of a claim for repayment of tax on bank interest under s. 36, subsection 1, that the taxpayer shall have "paid" to his bank the interest in respect of which he claims repayment of tax. In my opinion this means that the taxpayer must really, and not merely notionally, have paid the interest; there must be payment such as to discharge the debt; the payment must be a fact not a fiction.

Then in *Inland Revenue Commissioners v. Oswald* [1945] AC 360, 373, Lord MacMillan again expressed the view that unpaid interest never ceases to retain its character as interest, although it has from time to time been added to the capital indebtedness and has carried interest in turn. In that case, Lord Porter also said as follows:

> In each case there is a debt and in each case there is a contract under which, in default of payment, a so-called capitalization of interest takes place. It is true that in the one case the contract is constituted by the custom of bankers and in the other by a deed of mortgage, but the substance, though not the machinery, is the same. Capitalization means no more than that interest, which continues to be interest, shall be treated together with the capital sum due as itself interest-bearing but does not alter its quality as interest.

All these decisions show that capitalised interest is in fact compound interest which had not been capitalised and still retains its character as interest.

We now refer to the views expressed by two Judges of the High Court of Australia on the capitalisation of accrued interest in *Bank of New South Wales v. Brown* [1982-1983] 151 CLR 514, which is a case concerning s. 112 of the Australian Bankruptcy Act 1966. Gibbs CJ said at p. 523 as follows:

> When, in accordance with normal banking practice, accrued interest is debited to a customer's current account, and itself bears interest, it may be convenient to say that, as between the banker and the customer, and those who stand in their shoes, the interest is treated as capital. In truth, however, the interest is not converted into capital, and the rights of third parties must be determined on the footing that the interest retains its character as such.

Brennan J, after discussing three categories of "capitalisation", said as follows at p. 545:

> It follows that the character of a debt for interest is not altered when it is capitalized in accordance with what Lord Eldon LC in *Ex parte Bevan* called a "previous agreement". It is immaterial whether the previous agreement is to be found in the acceptance of the custom of bankers (whether an express or implied acceptance), in a bill of mortgage or in some other instrument securing a debt owed to a bank. An agreement which merely authorizes a bank to add accrued interest to the principal in order that the total sum should be secured or should bear interest does not alter the character of the debt for interest. The total sum may appropriately be described as "principal", but capitalization in this sense is no legal alchemy for changing the character of a debt for interest.

Mr. M.S. Murthi, as *amicus curiae*, stated that s. 28 of the Act was not concerned with the amounts advanced to the respondents as shown in the appellant banks' documentation of the loans. He referred to an affidavit affirmed by the assistant general manager of UMBC (pp. 76 to 85 of the UMBC appeal records) and pointed out that UMBC was not claiming over RM15,000,000 from its client respondent. Counsel referred us to *Commercial Banking Co. of Sydney Ltd. v. Love & Anor*. [1975] 7 ALR 535, in which the High Court of Australia decided that s. 83(2) of the Stamp Act 1921-1967 (Western Australia) provided for the payment of duty by limiting the recovery by the mortgagee to the amount of duty ultimately paid. The section does not limit the mortgagee's security to the amount of duty firstly paid. He

then referred us to *Westpac Banking Corporation v. Mousellis* [1985] 37 NTR 1, in which case the Supreme Court of the Northern Territory of Australia found that at the date of entry of judgment, none of the mortgages concerned has been duly stamped in accordance with s. 4(3) of the Taxation (Administration) Act 1978 (NT). The Court also held that it was a necessary inference from s. 69(B)(3) of the Act that, although not duly stamped, a security could be pleaded and used in evidence, despite s. 121, provided the action on it was limited to enforcing it to the extent of the amount covered by the duty paid. Counsel then urged us to follow the Australian authorities cited by him and to allow the appellants to recover only the amounts lent for which the instruments in question were covered by stamp duties paid by the chargors. Finally, Mr. Murthi also pointed out that if the documents in these cases are not further stamped with duties covering the capitalised interest, then the Government would, according to him, be losing "millions of dollars".

With respect, we do not propose to examine the provisions of the Australian Stamp Acts referred to in the cases cited by Mr. Murthi as they are not in *pari materia* with the provisions of our Act. The short answer to the anxiety expressed by Counsel is that if it should be intended that stamp duties should be chargeable on instruments reserving interest, then there ought to be an amendment of the Act to make the intention of the Legislature manifestly clear and unambiguous. It should however be noted that these proceedings were not the result of an appeal to the High Court under s. 39 of the Act nor has the Collector of Stamp Duties or any Counsel from Revenue applied to intervene in these proceedings.

Be that as it may, having considered the submissions of Counsel and what we have stated above, we are therefore of the view that capitalised interest and compound interest mean the same thing. Although it has been provided in the instruments concerned in each of these cases that interest be capitalised, yet as unpaid interest it retains the character of interest and the instruments concerned need not be separately and further stamped under s. 14 of the Act. In these cases, the principal sums of money lent or the amounts secured were limited to RM8,000,000 and RM150,000 respectively, and are distinguishable from the case of *Re Waterhouse's Policy* (*supra*) where the current account was without a limit. It is therefore our judgment that s. 28(1) of the Act is also applicable to these cases so that stamp duty is only chargeable on the original loan amounts.

Both appeals are therefore allowed but as Counsel for the respondents had indicated to us before we proceeded to hear the appeals that they were not opposing them, we would not make any order on costs in so far as these appeals are concerned. We hereby remit these cases back to the High Court for it to continue hearing the originating summons concerned. We would also like to repeat our expression of gratitude to all Counsel for the assistance they have rendered to this Court.

Also found at [1991] 2 CLJ 1470